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IN THE

Supreme Court of the United States

October Term, 1965

No. 577

METAL PRODUCTS WORKERS UNION LOCAL 1645, UAW-AFL-CIO and INTERNATIONAL UNION, UAW-AFL-CIO,

Petitioners,

v.

THE TORRINGTON COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No.

METAL PRODUCTS WORKERS UNION LOCAL 1645, UAW-AFL-CIO and INTERNATIONAL UNION, UAW-AFL-CIO,
Petitioners,

v.

THE TORRINGTON COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 24, 1965.

Opinions Below

The opinion of the District Court is reported at 237 F. Supp. 139 and reproduced in the appellant's appendix in the Court of Appeals at pp. A.A. 1-10.[1] The opinion of the Court of Appeals is reported at — F. 2d —, 59 L.R.R.M. 2588 and is printed in Appendix A hereto.

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[1] References to the respondent's (appellant below) appendix in the Court of Appeals will be indicated by "A.A." followed by the appropriate page number; references to the petitioner's (appellee below) appendix in the Court of Appeals will be to pages whose numbers are followed by "b."

Jurisdiction

The judgment of the Court of Appeals was entered on June 24, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether, under a broad provision for the arbitration of grievances contained in a collective bargaining agreement, a court may properly decline to hold arbitrable certain grievances not specifically exempted from arbitration by any written provision of the agreement.

Statutes Involved

The Federal Declaratory Judgment Act, as embodied in Chapter 151 of Title 28 of the U. S. Code:

> "§ 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. Act of June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; August 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349, 28 U. S. C. § 2201.
>
> §2202. *Further relief.*
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. Act of June 25, 1958, c. 646, 62 Stat. 964, 28 U. S. C. § 2202."

Section 301(a) of the Labor Management Relations Act of 1947:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. Act of June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156, 29 U. S. C. § 185."

Statement of the Case

On January 18, 1964, the parties ended a sixteen-week strike with the execution of a new collective bargaining agreement (A.A. 31). The agreement consists of seventeen articles dealing with most of the traditional subjects of collective bargaining.

For the resolution of disputes that might arise between them during the life of the agreement, the parties established machinery for the settlement of grievances either by mutual consent or, in the absence thereof, by the award of an arbitrator to be selected under the Voluntary Labor Arbitration Rules of the American Arbitration Association.

The presently relevant portions of the agreement's provisions concerning grievances and the arbitration thereof are:

> "ARTICLE IV
>
> GRIEVANCE PROCEDURE
>
> Section 1.
>
> Any dispute or question in regard to wages, hours, and working conditions, or in regard to the interpretation or application of any of the provisions of this agreement, shall be subject to the following grievance procedure: . . . ."

"ARTICLE V

ARBITRATION

Section 1.

If a grievance is not settled after it has been processed through the three (3) steps described in Article IV above, and if it is a grievance with respect to the interpretation or application of any provisions in this contract and is not controlled by Section 1 of Article XIV, (Management) it may be submitted to arbitration in the manner herein provided.

. . .

Section 3.

The arbitrator shall be bound by and must comply with all of the terms of this agreement and he shall have no power to add to, delete from, or modify, in any way, any of the provisions of this agreement. The arbitrator shall not have the authority to determine the right of employees to merit increases. The arbitrator shall have no authority to set or determine wages except as provided by Section 21 of Article VI, Wages."

In addition to the specific exemptions from the scope of arbitration referred to in the above-quoted provisions, disputes over certain other aspects of the parties' relationship are excluded from the arbitral process by other provisions of the agreement. Disputes concerning the contractual insurance plan are excluded from arbitration by Art. XI, § 1(f); those relating to pension benefits are excluded by Art. XII; those relating to subcontracting by Art. XIV, § 3; those relating to transfer of operations or equipment by Art. XV, § 7; and those relating to discussions for a new contract by Art. XVII. No other provision in the agreement purports to exclude any class of grievance from the broad scope of arbitration described in Art. V, § 1.

Between February 13, 1964, and June 4, 1964, the petitioner (hereinafter referred to as the "Union") filed three grievances in which it charged the respondent (hereinafter referred to as the "Company") with violation of the agree-

ment's seniority provisions arising from the manner in which three employees—Lassiter, Latina, and Kuehl—were returned to work after the conclusion of the strike (A.A. 25, 27, 29). Each of the grievances was processed through the various steps of the contractual procedure; and in each case the Company conceded the applicability of the seniority provisions to the facts at hand but denied that it had committed any violation thereof (A.A. 26, 27-29, 30).

In an earlier grievance, however, the Union claimed that the Company "violated the seniority provisions of the contract by neglecting to call Michael Chiarito back to work" at the end of the strike (A.A. 22). The Company's answer was that "the strike settlement terms did not stipulate that the contract recall provisions would apply to the return of employees [and therefore], the grievant has no contractual claim . . ." (A.A. 23).

The Chiarito grievance was referred to arbitration; and on June 26, 1964, arbitrator John A. Hogan rendered his award (A.A. 19-25) determining that the matter was not arbitrable because there was "no contract provision to arbitrate" (A.A. 24).[2]

Although the Company asserted throughout the grievance procedure that no contractual provision covered the Chiarito matter it did not question the arbitrability of any of the grievances involved in this litigation until well after the rendition of John Hogan's award.[3]

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[2] On Sept. 2, 1964, the Union sued to vacate the Hogan award. The Company's motion for summary judgment was granted (*Metal Products Workers Union, Local 1645, UAW-AFL-CIO* v. *Torrington Company*, — F. Supp. —, 59 L.R.R.M. 2267 [D. Conn.]) on April 30, 1965; and the Union has perfected its appeal from the judgment in the Company's favor.

[3] Arbitrability of the Lassiter grievance was first disputed July 3, 1964 (A.A. 16, ¶ 15). Arbitrability of the Kuehl grievance was first disputed July 15, 1964 (A.A. 17, ¶ 19). No dispute as to the arbitrability of the Latina grievance was raised by the Company until the institution of the present litigation (A.A. 18, ¶ 23).

On October 29, 1964, the Company brought the present action, seeking a declaration of the non-arbitrability of the Lassiter, Kuehl and Latina grievances. Special federal question jurisdiction was found upon § 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185 (A.A. 12, ¶ 3).

Without answering the complaint, the Union moved for summary judgment and for an order compelling arbitration (A.A. 40-41). In opposition, the Company submitted affidavits of Joseph J. Palker and Harry B. Purcell (A.A. 30-37). The Union moved to strike portions of these affidavits upon the ground that matter contained therein is inadmissible in evidence (pp. 1b-3b).

The Union's motion for summary judgment and to compel arbitration and its motion to strike portions of the Company's affidavits were heard by Judge Robert C. Zampano of the U. S. District Court for the District of Connecticut on December 7, 1964.

On January 20, 1965, Judge Zampano's memorandum of decision, granting the Union's motion for summary judgment, issued (A.A. 1-7). On February 5, 1965, Judge Zampano signed the order and judgment (A.A. 8-10) from which the Company took its appeal.

On February 11, 1965, the Company filed its notice of appeal (A.A. 10); and on February 25, 1965 the Union cross-appealed (A.A. 10-11).

The Court of Appeals, in a decision written by Judge Paul R. Hays, reversed the judgment of the District Court and dismissed the cross-appeals. Judge Hays declared that "controversies concerning recall to work after a strike are not prima facie grievances 'with respect to the interpretation or application' of any of the provisions of the usual collective bargaining agreement"; and the cause was accordingly remanded for trial.

Reasons for Allowance of Writ

This case involves a question of paramount importance concerning the arbitration under collective bargaining agreements of disputes between employers and unions. The decision of the court below is clearly in conflict with established precedents of this Court; is in conflict with decisions of other circuits concerning the arbitrability of grievances over the recall of strikers; and is in conflict with decisions of other circuits as to the admissibility of extrinsic evidence for the purpose of imposing restrictions upon a broad arbitration provision.

1. In *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 457 (1957), this Court issued a mandate to the federal judiciary to adumbrate a body of substantive common law of the collective bargaining agreement "by looking at the policy of the [national labor] legislation and fashioning a remedy that will effectuate that policy."

In the following years, it is safe to say, litigation concerning collective bargaining agreements has been most prolific indeed. The obvious dependence of the nation's economy upon the formulation of workable standards of conduct in labor relations, as well as the need for this Court to settle important legal questions in the emerging common law of the collective bargaining agreement, is documented by the steady stream of major labor law decisions which issue from this Court each year.

2. Doubtless the most far-reaching decisions since *Lincoln Mills* are the celebrated trilogy—*United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U. S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960)—in which this Court laid down broad rules governing the arbitration of disputes under collective bargaining agreements. The *American Mfg.* and *Warrior & Gulf* cases presented the issue of arbitrability as viewed

in a proceeding to compel or stay arbitration; while the *Enterprise* decision concerned itself with the allowable scope of review of an arbitrator's award.

The relevant provision of the collective agreement before the Court in *American Mfg.* authorized the arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement . . ." (363 U. S. 564, 565 n. 1). In *Warrior & Gulf* the parties provided for the arbitration of "differences [which might] arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement . . ." (363 U. S. 574, 576).

In spite of the textual differences between the two provisions, the Court held that they both contemplated an unlimited scope of arbitrability of disputes that might arise during the life of the respective collective bargaining agreements. In *American Mfg.* the employer contended that the grievance could not be founded upon particular contract language and was therefore not arbitrable. The Court rejected that notion, holding that an agreement to submit grievances "as to the meaning, interpretation and application of the provisions of this agreement" was in effect an "agreement to submit all grievances to arbitration, not merely those which the court will deem meritorious" (363 U. S. 564, 568). The Court noted that there "is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is the quid pro quo for the other" (363 U. S. 564, 567). Thus, in *Warrior & Gulf,* it declared:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement" (363 U. S. 574, 581).

The decision of the court below, it is respectfully submitted, appears to jibe more with the personal views of its author[4] than with the policy enunciated by this Court in the 1960 trilogy. In reversing the District Court's grant of summary judgment, the Court of Appeals proclaimed the theory—wholly at variance with the *American Mfg.* and *Warrior & Gulf* cases—that certain classes of grievances are not, prima facie, arbitrable (p. 5a), and that one such type of grievance is that involving the recall of strikers after the execution of a collective bargaining agreement.

3. The Court of Appeals' decision is not only in conflict with the broad formulations concerning arbitrability handed down in the 1960 trilogy, but with decisions of the Fourth and Seventh Circuits on the specific question of the arbitrability of striker-recall grievances.[5]

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[4] A discussion of Judge Hays's published views concerning labor arbitration is set forth in Appendix B.

[5] The determination of the court below that "controversies concerning recall to work after a strike are not prima facie . . . grievances 'with respect to the interpretation or application' of any of the provisions of the usual collective bargaining agreement" is not only in conflict with other judicial authority, but with the overwhelming weight of arbitral caselaw. See *Robertshaw Controls Co.*, 42 Lab. Arb. 823 (Burton S. Turkus, 1963); *St. Louis Newspaper Publishers' Ass'n*, 33 Lab.Arb. 471 (Milton D. Green, et al., 1959); *United States Pipe & Foundry Co.*, 62-2 CCH Arb. ¶ 8462 (Laurence E. Seibel, 1961); *Bird & Sons*, 33 Lab.Arb. 777 (William N. Loucks, 1959); *Lake Mining Co.*, 28 Lab.Arb. 445 (Maurice O. Graff, 1957); and *Bethlehem Steel Co.*, 30 Lab.Arb. 808 (Ralph T. Seward, 1958). In *Olin Mathieson Corp.*, 42 Lab.Arb. 623 (Sidney A. Wolff, 1964) the arbitrator observed that the majority view was that such grievances are arbitrable, but, noting that "an arbitrator is not bound by precedent" (*Id.* at 625), held the grievances before him to be not arbitrable. He cited *Walben Div. of Kanair Corp.*, 40 Lab.Arb. 267 (William N. Loucks, 1963) as precedent for his view, but in that case the issue of arbitrability was not discussed at all, and the grievances were denied on the merits. In *Bird & Sons, supra*, the same arbitrator who wrote the *Walben* opinion, squarely held such grievances to be arbitrable.

In *IAM, Lodge 1652* v. *International Aircraft Servs.*, 302 F. 2d 808 (4th Cir. 1962) the union had sued to compel arbitration of grievances that, following the end of a strike, the employer improperly retained at work strike replacements who, under the collective agreement, were probationary employees and in consequence failed to recall strikers in accord with their seniority. The District Court granted the employer's motion for summary judgment dismissing the complaint, but the Court of Appeals, in an opinion written by Chief Judge Sobeloff, reversed and remanded with instructions that the District Court order arbitration.

The same result as in the *International Aircraft* case was reached in the recent decision in *Packinghouse Workers* v. *Du Quoin Co.*, 337 F. 2d 419 (7th Cir. 1964). Although the District Court's order in the *Du Quoin* case appears not to have been published, it seems from the Court of Appeals' opinion that the litigation invclved an application by a union to compel arbitration of grievances similar to those presented in the case at bar. In *Du Quoin* an eleven-month strike had preceded the execution of a collective bargaining agreement. Although the agreement contained no explicit reference to the return to work of striking members of the union, the union grieved, *inter alia*, about the transfer of a job formerly performed by a member of the bargaining unit outside the unit. If the union's grievance had been sustained, the individual or individuals affected would have had to be recalled in accord with seniority and, presumably, back pay would have beeen awarded. As the Court of Appeals observed in affirming the District Court's order compelling arbitration:

> "Whatever this Court may think of the actual merits of the Union's position, it is an arguable one. As the District Court found:
>
> > It would appear that the question presented deals directly with the meaning and application of the collective bargaining agreement. Defendant contends that the collective bargaining agreement

> does not and was not intended to cover the acts complained of, while plaintiff contends that the acts and conduct of the company complained of are violations of the collective bargaining agreement.
>
> "The parties have agreed to arbitrate differences arising between them as to the meaning and application of the provisions of the agreement. This is such a difference" (57 L.R.R.M. 2269).

4. In one other respect the decision of the court below involves an important question as to which there is presently a conflict among the various circuits. In remanding this cause for trial, the court below said:

> ". . . it will be necessary to consider whether, as the Union claims, there was an agreement, express or implied, that disputes over recall of strikers should be governed by the arbitration provisions of the collective bargaining agreement and by the substantive provisions of that agreement so adapted or analogized as to be appropriate to the purpose or whether, as the Company claims, there was an agreement relating only to recall of strikers and not providing for arbitration."

By this mandate, the court below necessarily authorized the taking of extrinsic testimony of bargaining history or side agreements for the purpose of reading exemptions into an otherwise broad arbitration provision. In this respect the court below [6] differs with at least two other circuits—the Fourth and Fifth. See, e.g., *IAM* v. *International Aircraft Servs., supra; Lewis* v. *Lowry*, 332 F. 2d 453 (4th Cir. 1963); and *IAM* v. *Hayes Corp.*, 296 F. 2d 238 (5th Cir. 1961), rehearing denied 316 F. 2d 90 (5th Cir. 1963). In agreement on this point with the court below are the Seventh and

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[6] On this question the decision below is also at variance with other precedent in the Second Circuit. See *Local 12298, UMW* v. *Bridgeport Gas Co.*, 328 F. 2d 381 (2d Cir. 1964). Judge Moore, a member of the panel that decided this case in the court below, dissented from the majority's holding in *Bridgeport Gas*.

Ninth Circuits. See *Independent Petroleum Workers* v. *American Oil Co.*, 324 F. 2d 903 (7th Cir. 1963), affirmed by equally divided court, 379 U. S. 130 (1964) and *Communication Workers* v. *Pacific Northwest Bell Tel. Co.*, 337 F. 2d 455 (9th Cir. 1964). It is respectfully submitted that the conflict among the circuits on this point can only be resolved by this Court's determination.

5. Although the decision of the court below is not in theory dispositive of the present litigation, the burden of proof imposed thereby upon the Union makes it well-nigh unthinkable that the grievances herein involved would be ruled arbitrable by the trial court. The court below did not only obliterate the presumption of arbitrability imposed by the *American Mfg.* and *Warrior & Gulf* decisions; it went further and found a rebuttable presumption of the non-arbitrability of striker-recall grievances.[7] It is difficult to imagine any union being able to meet so onerous a burden of proof upon an issue which every company, if given license so to do, will loudly declaim was understood by the parties to be exempted from arbitration.

The decision below from one point of view is merely an interlocutory order reversing the grant of summary judgment and ordering a trial of the issues at bar. We respectfully submit it is of far greater consequence. If such decisions are allowed to stand, the enunciated policy of the *American Mfg.* and *Warrior & Gulf* cases will be wholly subverted by the contrary approach, in which parties seeking arbitration under collective bargaining agreements will

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[7] "Provisions of the collective bargaining agreement are not directly relevant to recall of strikers. In order to apply them to this situation for which they were not designed they must be adapted or selected by analogy. If, therefore, the collective bargaining agreement, including the arbitration clause, is applicable to the recall grievances it must be because there is some special agreement making it applicable or because of some custom or common understanding which has that effect."

frequently be compelled to make vast expenditures of time and money in order to invoke the relatively simple process for the resolution of industrial disputes which this Court endorsed in 1960.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

September 17, 1965.

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Attorney for Petitioners.

APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 467—September Term, 1964.

(Argued May 4, 1965 Decided June 24, 1965.)

Docket No. 29581

THE TORRINGTON COMPANY, INC.,
Plaintiff-Appellant,

—v.—

METAL PRODUCTS WORKERS UNION LOCAL 1645, UAW-AFL-CIO, and INTERNATIONAL UNION UAW-AFL-CIO,
Defendants-Appellees.

Before:

MOORE, SMITH and HAYS,
Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Robert C. Zampano, *Judge,* 237 F. Supp. 139 (1965), granting defendants' motion for summary judgment and for an order compelling arbitration of certain grievances in an action in which plaintiff sought a declaratory judgment that the grievances were not arbitrable.

Reversed and remanded for trial.

Appendix A—Opinion of the Court Below

JAY S. SIEGEL, Hartford, Connecticut (William J. Larkin, 2d, Waterbury, Connecticut and C. E. Harwood, Torrington, Connecticut, on the brief), for *Appellant.*

JEROME S. RUBENSTEIN, Rubenstein & Rubenstein, New York, N. Y. (Richard E. Miller, New York, N. Y., of counsel), for *Appellees.*

HAYS, *Circuit Judge:*

In this action plaintiff sought a declaratory judgment that three grievances on which defendants demanded arbitration were not arbitrable. The district court granted a motion by the defendants for summary judgment and for an order compelling arbitration of the grievances. 237 F. Supp. 139 (D. Conn. 1965). In its order the district court "found" (but did not "order") that "all the disputes between the parties, including the existence, scope and effect of [an] . . . alleged independent oral agreement [between them] should be resolved in arbitration rather than by this Court." Since arbitration with respect to the oral agreement was not sought by either party and since both parties appeal from that part of the order which grants this relief, we will disregard the "finding" as mere surplusage.

The plaintiff appeals from all parts of the district court's order. The defendants cross-appeal, not only from the "finding" which we have decided to disregard, but also from the denial of defendants' motions to strike certain parts of the plaintiff's affidavits and from the failure "to declare, that under the parties' collective bargaining agreement, any grievance that is not explicitly excluded from arbitration by a written provision of the agreement is subject to arbitration on the merits."

We reverse the order granting summary judgment for the defendants and compelling arbitration of the defend-

ants' grievances. We dismiss the defendants' cross-appeal on the ground that the points raised are not appealable.

The present controversy arises out of a sixteen week strike at the plaintiff's plant. On January 18, 1964 the plaintiff (Company) and the defendant Local Union (Union) entered into a collective bargaining agreement and terminated the strike. At that time there were approximately 2000 employees of the Company on strike. One of the problems facing the parties in their task of restoring the plant to its normal operations was the order of recall of employees. According to the Company's affidavits the Union proposed that the procedures provided by the new collective bargaining agreement for recall from layoff be applied to the return of the strikers. The Company rejected this proposal. The Company says that the Union then proposed that the Company permit all strikers to return to work and then lay off the unneeded employees in accordance with the seniority provisions of the collectvie bargaining agreement. The Company also rejected this proposal. The Company maintains that it and the Union thereupon agreed that the Company was to recall strikers in accordance with production requirements and without regard to any of the provisions of the new collective bargaining agreement. This agreement, says the Company, contained no provision for the arbitration of disputes arising under it. The Union denies that any such special agreement for the return of strikers was ever entered into.

At various times within a few weeks after the end of the strike, the Union filed three grievances. Each of the grievances had to do with the recall of a striking employee. The parties followed the contractual procedure for the adjustment of grievances but failed to adjust these controversies in the course of that procedure. The Union then demanded arbitration. The Company declined to arbitrate, claiming that it was under no duty to arbitrate controversies over recall of strikers. The Union's position is that

the arbitration provisions of the collective agreement are applicable.

The relevant parts of the collective bargaining agreement are:

"ARTICLE IV

Grievance Procedure

Section 1.

Any dispute or question in regard to wages, hours, and working conditions, or in regard to the interpretation or application of any of the provisions of this agreement, shall be subject to the following grievance procedure: * * *

ARTICLE V

Arbitration

Section 1.

If a grievance is not settled after it has been processed through the three (3) steps described in Article IV above, and if it is a grievance with respect to the interpretation or application of any provisions in this contract and is not controlled by Section 1 of Article XIV, (Management) it may be submitted to arbitration in the manner herein provided.

* * * * *"

It is obvious that on their face the provisions of the collective bargaining agreement do not purport to provide for arbitration of controversies arising out of recall of strikers. Such controversies may be subject to the grievance procedure, for that provides for using the grievance procedure for any dispute or question in regard to wages, hours, and working conditions. But the arbitration procedure is much more circumscribed. Only if a grievance is not settled in the grievance procedure "*and* if it is a

grievance with respect to the interpretation or application of any provisions in this contract" (emphasis supplied) is it subject to arbitration.

Controversies concerning recall to work after a strike are not prima facie, at any rate, grievances "with respect to the interpretation or application" of any of the provisions of the usual collective bargaining agreement. And the collective bargaining agreement between the parties to the present case contains no provisions which expressly relate to the recall of strikers. Provisions of the collective bargaining agreement are not directly relevant to recall of strikers. In order to apply them to this situation for which they were not designed they must be adapted or selected by analogy. If, therefore, the collective bargaining agreement, including the arbitration clause, is applicable to the recall grievances it must be because there is some special agreement making it applicable or because of some custom or common understanding which has that effect.

The Company claims that there was indeed a special agreement between the parties, but that the effect of this agreement was to provide for recall of strikers in a manner quite different from that which would be applied under an adapted version of analogous provisions of the collective bargaining agreement.

The foregoing analysis of the claims of the parties makes it quite clear that there are disputed issues of fact and that summary judgment is therefore inappropriate.

The only remaining question is to whom the resolution of the factual issues should be assigned—court or arbitrator. It would be possible to assign to an arbitrator the duty of deciding first this issue of arbitrability and, if he should decide that issue in favor of arbitrability, then the further duty of deciding the grievances. This is probably what the lower court had in mind when it made its "finding" that the issue of whether there was a special agreement as claimed by the Company "should" be resolved in arbitra-

tion. In the case of another similar grievance which arose a short time before the present grievances the parties themselves voluntarily submitted this very question of arbitrability to an arbitrator who resolved it in favor of the Company, i.e., found that the issue was not arbitrable.[1]

But, although the parties may voluntarily submit arbitrability to an arbitrator, they cannot be forced to do so.

"A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960); see *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 184 (2d Cir. 1962), cert. denied, 374 U. S. 830 (1963).

Moreover, one who claims that there is an agreement to leave arbitrability to the determination of an arbitrator "must bear the burden of a clear demonstration of that purpose." *United Steelworkers* v. *Warrior & Gulf Nav. Co., supra,* 363 U. S. at 583 n. 7.

The cases make it quite clear that the question whether the parties have agreed to submit a given dispute to arbitration is a question for the courts.

> "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Ref. Co.*, 370 U. S. 238, 241 (1962).

Of course the question of whether or not there is any such contract is also a question for the courts.

> "The duty to arbitrate is wholly contractual and the courts have the obligation to determine whether

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[1] The award was upheld against a motion to vacate in *Metal Prods. Workers Union* v. *Torrington Co.* — F. Supp. — (D. Conn. 1965).

there is a contract imposing such a duty." *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co., supra,* 312 F. 2d at 184.

"[J]ust as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori,* it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley & Sons* v. *Livingston,* 376 U. S. 543, 547 (1964).

In the present case it is the duty of the district court to determine whether the parties ever entered into any agreement to arbitrate the grievances submitted by the Union. In order to do this it will be necessary to consider whether, as the Union claims, there was an agreement, express or implied, that disputes over recall of strikers should be governed by the arbitration provisions of the collective bargaining agreement and by the substantive provisions of that agreement so adapted or analogized as to be appropriate to the purpose or whether, as the Company claims, there was an agreement relating only to recall of strikers and not providing for arbitration.

The judgment is reversed and the case remanded for trial.

APPENDIX B

Writings on Labor Arbitration by Judge Paul R. Hays

In 1960 Judge (then, Professor) Paul R. Hays wrote:

> "Perhaps it would be fair to say that the Court's view of labor arbitration, as expressed in these opinions, [the 1960 trilogy,] is romantic rather than realistic and rational. The picture given of the arbitration process sounds more like the praise of arbitration one might hear in the speeches at a dinner in honor of some popular arbitrator, or at a public function of an arbitration group. It suggests only a vague resemblance to the hard, practical day to day processes of hearing and determining grievances."[i]

Of particular concern to the writer was the Court's broad construction of the typical arbitration provision. It seemed "quite unfair" that Professor Archibald Cox, who may not have been as enthusiastic about the virtues of arbitration as were the Court's majority, should have been quoted "in support of this extravagant description of collective bargaining and arbitration." Thus:

> "Professor Cox argues, for example, that the law should draw the highly important distinction, which the Court ignores, between a frivolous claim that is within the scope of the agreement and therefore should be subject to arbitration, and a frivolous assertion that a claim is within the scope of the agreement. Difficult as the application of this distinction may be, it is basic to the determination of the place of the courts in the arbitration process."[ii]

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[i] Hays, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901, 930 (1960).

[ii] *Id.* at 931.

Appendix B—Writings on Labor Arbitration by Judge Paul R. Hays

In November of 1964 Judge Hays gave a series of lectures entitled "Labor Arbitration—A Dissenting View." In the third lecture, subsequently published in the *Yale Law Journal,* he reiterated his disagreement with this Court's view of arbitrability as expressed in the *Warrior & Gulf* case:

> "It may be that, as courts become more familiar with the real nature of the arbitration process, they will . . . recede from the more extreme positions respecting arbitration. A reading of Dean Shulman's famous lecture and a selective reading from some of Archibald Cox's work does not provide a sufficient basis for a judgment as to the character of the arbitration process." [iii]

On the virtues of arbitration as a process for the resolution of labor-management disputes, Judge Hays demurred:

> "In literally thousands of cases every year decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training, skill, intelligence and character. In fact, a proportion of arbitration awards, no one knows how large a proportion, is decided not on the basis of the evidence or of the contract or other proper considerations, but in a way calculated to encourage the arbitrator's being hired for other arbitration cases. It makes no difference whether or not a large majority of cases is decided in this way. A system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood or even for substantial supplements to his

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[iii] Hays, *The Future of Labor Arbitration,* 74 YALE L. J. 1019, 1033-34 (1965).

regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system. . . .

"It is my view that intervention by the courts, even if a broad intervention should be permitted, is not a sufficient answer to the shortcomings of labor arbitration. I believe that the courts should not lend themselves at all to the arbitration process. Labor arbitration is a private system of justice not based on law and not observant of law. There is no reason why it should be able to call upon the legal system to enforce its decrees. On the contrary, there are positive reasons for the courts not exercising their enforcement powers in favor of arbitration. We know that a large proportion of the awards of arbitrators are rendered by incompetents, that another proportion we do not know how large but are permitted by the circumstances to suspect that it is quite substantial, are rendered not on the basis of any proper concerns, but rather on the basis of what award would be best for the arbitrator's future. We know also that there is another group of cases, though it is true that the courts are not called upon for enforcement in such cases, in which the arbitrator has rendered a rigged award, a practice so vicious as to be unacceptable in any system of justice." [iv]

[iv] *Id.* at 1035.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 577

METAL PRODUCTS WORKERS UNION LOCAL 1645, UAW-AFL-CIO,

Petitioners,

v.

THE TORRINGTON COMPANY,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Respondent files this brief in support of its position that this matter should not be reviewed by this Court.

OPINION BELOW

The opinion of the District Court is reported at 237 F. Supp. 139 and reproduced in the Appendix to this brief at page 1A.

The opinion of the Court of Appeals is reported at 347 F. 2d. 93, and is printed in Appendix A, pages 1A through 7A of the Petitioner's Petition for a Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Is the determination as to the existence, scope, and effect of a contract and any attendant obligation to arbitrate disputes arising thereunder, properly rendered by the Court rather than by an arbitrator in the absence of a showing that such authority was conferred upon the latter?

STATEMENT OF THE CASE

On January 18, 1964, the Respondent (hereinafter referred to as the "Company") and the Petitioners (hereinafter referred to as the "Union") entered into a collective bargaining agreement terminating a strike of some length at the Company's Torrington Divisions. At the time agreement was reached, there were approximately 2,000 employees of the Company on strike.

Following the conclusion of the labor contract negotiations, the parties then entered into separate discussions as to the manner of recalling the striking employees. The Company rejected the Union's request to have the provisions of the new labor agreement apply to the recall. The parties then reached a separate agreement on special procedures for the recall. This independent agreement contained no provision for the arbitration of disputes arising thereunder. The new labor contract contained no reference to this subject, which was outside the normal working relationship of the parties.

The Union filed three grievances involving the manner of recall of strikers, Jerry Lassiter, Anna Kuehl and S. Robert Latina (A. A. 25, 27 and 29) which grievances, after being denied by the Company, were referred to arbitration by the Union. Prior to the arbitration hearings, the Company filed an action for a declaratory judgment in the District Court requesting a determination as to whether or not it was obligated to arbitrate these grievances (A. A. 11). The Union moved for summary judgment under Rule 56 and to compel arbitration under Section 4 of the United States Arbitration Act (A. A. 40).

On January 20, 1965, the District Court, although admitting that "the pleadings and affidavits raise factual questions as to the existence, scope and effect" of the independent strike settlement agreement, issued a decision referring the determination of the question of arbitrability back to the Arbitrator selected to hear each grievance. [1/]

The Company appealed from this decision (A. A. 1-10) contending the determination of its obligation to arbitrate was properly for the Court not the Arbitrators.

The Court of Appeals on June 24, 1965, reversed the District Court and remanded the matter, instructing the Court to make such determination after first resolving the factual dispute over the existence, scope and effect of the agrement. (Appendix to Petitioners' brief 1A-7A).

The Union then filed its Petition requesting this Court grant a Writ of Certiorari.

1/ Pages 1A-7A of this Brief

ARGUMENTS AGAINST THE ALLOWANCE OF THE WRIT

A.

THE LAW INVOLVED IS WELL SETTLED

The petition for writ of certiorari poses no unusual or unique question for this Court and does not involve a conflict between the Circuits. This Court has on two occasions in recent years clearly expressed its position regarding the appropriate forum for the determination as to the existence of an agreement to arbitrate and the duty of a party thereunder. **Atkinson v. Sinclair Refining Co.**, 370 U. S. 238, 241; **John Wiley & Sons v. Livingston**, 376 U. S. 543. The Court's statement in **Wiley** leaves no doubt on this point:

> "Under our decisions, whether or not the Company was bound to arbitrate as well as what issues it must arbitrate is a matter to be determined by the Court on the basis of the contract entered into by the parties" at p. 546-7.

The clarity of this pronouncement has resulted in unanimous adherence in every circuit and has not been the source of any conflicts requiring clarification by this Court.

B.

THE CIRCUIT COURT PROPERLY ADHERED TO THE DECISIONS OF THIS COURT

The issue before the Court of Appeals, was whether the District Court erred in referring the dispute involving the independent strike recall agreement and the Company's duty to arbitrate grievances arising thereunder to an arbitrator for determination instead of doing so itself.

The Circuit Court relying **expressly** upon **Atkinson & Wiley** noted that the cases make it quite clear that it is the duty of the Courts to resolve such quesions. The Court of Appeals' action was consistent with its earlier position in **Independent Union vs. Proctor and Gamble** 312 F. 2d. 181, 184; **cert. den'd.** 374 U. S. 830. Further, the fact that the Court in its opinion succinctly spelled out the duty of the District Court, constituted full and complete adherence to the decisions of this Court and makes unnecessary any review thereof.

C.

THE PETITION IS PREMATURE

The Petition deals at great length with the substantive issue of arbitrability even though the District Court has not yet handed down a decision. In this posture, the question presented by the Petition is obviously premature. Indeed, the Petitioner in its brief concedes this point when it notes that the decision below is an interlocutory order reversing the grant of summary judgment and ordering a trial of the issues at bar. (p. 12)

Respondent submits that in the absence of a determination by the District Court as to the existence, scope and effect of the independent agreement regarding the manner of recall of the striking employees, the record is not in appropriate form for this Court to grant review.